Rusdi Kirana v Cheah Khoon Tee

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-23-03 OF 1997
KAMALANATHAN RATNAM J
9 OCTOBER 1998

Civil Procedure *— Costs — Security for costs — Both parties reside out of jurisdiction — Respondent did not state address of residence within jurisdiction — Failure of respondent to give explanation for omission to state address in writ — Absence of proper defence on part of respondent to contradict applicant's allegations — Rules of the High Court 1980 O 23 r 1(1)(a) & (c)*

This was an application for security for costs by the defendant (the applicant in this case) pursuant to O 23 r 1(1)(a) and (c) of the Rules of the High Court 1980 ('the RHC'), for the libel action being brought against him by the plaintiff (the respondent in this case). Both parties are directors of Channel Dimension Sdn Bhd ('Channel'). The plaintiff, being a citizen of Indonesia, gave no address of residence within the jurisdiction of the court while the defendant, a Singapore citizen, did. The defendant had made a direct challenge towards the plaintiff's omission to do so, but the plaintiff had failed to respond nor to give proper explanation as to the reasons for not doing so. Despite claiming to own 7,163 shares in Channel and averred that he is the managing director and the majority shareholder of Merpati Nusantara Sdn Bhd, plaintiff had again failed to contradict defendant's allegations that Channel has ceased to operate and that plaintiff is not registered with the Registrar of Companies as a shareholder of Merpati Nusantara Sdn Bhd.

Held, allowing the application:

(1) The plaintiff had given no evidence of his having any address of residence in Malaysia. The defendant had made a direct challenge to the issue of residence of the plaintiff, yet the plaintiff did not respond. Order 23 r 1(2) of the RHC gives the plaintiff an opportunity to explain that the omission to state the address in the writ was done innocently and without an intention to deceive. Overlooking this provision and giving no explanation therefore must necessarily mean that the said omission was deliberate (see p 332C–F).

(2) Due to failure on the part of the plaintiff to contradict the allegation that Channel has in fact practically ceased to operate and to prove that he is the managing director and the majority shareholder of Merpati Nusantara Sdn Bhd, the court is satisfied that this is a proper case for it to exercise its discretion in favour of the applicant/defendant and to order security for costs (see pp 332H–I, 333C).

[Bahasa Malaysia summary

Ini adalah suatu permohonan untuk jaminan untuk kos oleh defendan (pemohon di dalam kes ini) sejajar dengan A 23 k 1(1)(a) dan (c) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), bagi tindakan libel yang dibawa terhadapnya oleh plaintif (responden di dalam kes ini). Kedua belah pihak adalah pengarah Channel Dimension Sdn Bhd ('Channel'). Plaintif, seorang warganegara Indonesia, tidak memberikan sebarang alamat residennya di dalam bidang kuasa mahkamah manakala defendan, seorang warganegara Singapura, ada memberikannya. Defendan telah membuat cabaran secara langsung terhadap peninggalan plaintif, tetapi plaintif telah gagal untuk memberi jawapan mahupun memberi penjelasan untuk tidak berbuat demikian. Sungguhpun mengaku mempunyai 7,163 saham di dalam Channel dan menegaskan bahawa beliau adalah pengarah urusan dan pemegang saham majoriti Merpati Nusantara Sdn Bhd, plaintif telah sekali lagi gagal untuk menyangkal tuduhan-tuduhan defendan iaitu Channel telah berhenti beroperai dan plaintif tidak didaftarkan dengan Pendaftar Syarikat sebagai seorang pemegang saham Merpati Nusantara Sdn Bhd.

Diputuskan, membenarkan permohonan:

(1) Plaintif telah tidak memberi bukti yang dia mempunyai sebarang alamat residen di Malaysia. Defendan telah mencabar secara langsung terhadap isu residen plaintif, tetapi plaintif tidak memberi jawapan. Aturan 23 k 1(2) KMT memberikan plaintif peluang untuk menerangkan bahawa peninggalannya untuk menyatakan alamat di dalam writ adalah dilakukan dengan tidak sengaja dan tanpa niat untuk menipu. Dengan tidak mengendahkan peruntukan ini dan tidak memberi apa-apa penjelasan, mestilah bermakna peninggalan itu adalah disengajakan (lihat ms 332C–F).

(2) Akibat kegagalan plaintif untuk menyangkal tuduhan bahawa Channel telah berhenti beroperasi dan membuktikan bahawa beliau adalah pengarah urusan dan pemegang saham majoriti Merpati Nusantara Sdn Bhd, mahkamah berpuashati bahawa ini adalah kes yang sesuai baginya untuk menggunakan budi bicaranya bagi pihak pemohon/defendan dan memerintahkan jaminan untuk kos (lihat ms 332H–I, 333C).]

Notes

For cases on security for costs, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1338–1369.

Cases referred to

Abdul Fatah Mogawan & Anor v MMC Power Sdn Bhd & Anor [1997] 5 CLJ 1 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

A **Legislation referred to**

Rules of the High Court 1980 O 23 rr 1(1)(a), (c), (2)

Haris bin Mohd Ibrahim (Adam & Co) for the applicant/defendant.
KT Ho (Gan Ho & Razlan Hadri) for the respondent/plaintiff.

B *Cur Adv Vult*

Kamalanathan Ratnam J:

Facts

C Both the plaintiff and defendant were at all material times directors of Channel Dimension Sdn Bhd ('Channel'). The plaintiff sued the defendant for damages for libel. Whilst pleading that he is a citizen of Indonesia, the plaintiff gave no address of residence within the jurisdiction of this court. The defendant is a Singapore citizen but the statement of claim contains a local address for service of the defendant.

D *The application*

Having filed his defence, the defendant now applies for security for costs of the action amounting to RM100,000 pursuant to O 23 r 1(1)(a) and (c) of the Rules of the High Court 1980 ('the RHC').

E *Court's finding*

Whilst admitting that he is an Indonesia citizen, the plaintiff has clearly failed to state his address in the writ.

Order 23 r 1(1)(a) and (c) read as follows:

F > Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court —
>
> (a) That the plaintiff is ordinarily resident out of the jurisdiction; or
>
> (b) ...
>
> (c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or ... .

G Order 23 r (2) reads as follows:

> The Court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.

H In fact, even in his affidavits filed to oppose this application, the plaintiff has not given any address within this jurisdiction. In *Abdul Fattah Mogawan & Anor v MMC Power Sdn Bhd & Anor* [1997] 5 CLJ 1, I had held that security for costs should not be ordered as of right against a I foreign plaintiff, but only if the Court thinks it just to order, depending on the circumstances of the case. In that case, the plaintiff had rented premises and had been given extensions and approval by the Malaysian

Government and the immigration authorities to stay in Malaysia because of the case. With regard to the meaning to be ascribed to the words 'ordinarily resident,' I said at p 6:

> It is possible for a person to have a home in, say, the United Kingdom, a home in Australia, and a home in Singapore. To my mind, when that person takes time off to spend time and stay in any of that country, he is then ordinarily resident in that country. Similarly, the plaintiffs in this case have set up a home in Kuala Lumpur and are doing all things that a family would do when it has set up its home in Kuala Lumpur. In that sense, the plaintiffs are ordinarily resident in Malaysia and not out of the jurisdiction. They are no doubt Filipino citizens but they are ordinarily resident in Malaysia with the consent and permission of the Government of Malaysia and the immigration department. The plaintiffs are compelled by the exigencies of having to file proceedings in this country and to vindicate and exculpate themselves and for these purposes they have to be ordinarily resident here; in other words there must be a settled purpose.

In the case before me, the plaintiff has given no evidence of his having any address of residence in Malaysia. In any case, the defendant had in his affidavit in support of this application, specifically referred to the absence of any reference to a local address of residence of the plaintiff. The defendant had made a direct challenge to the issue of residence of the plaintiff, yet the plaintiff did not respond. At this juncture, I must refer to O 23 r 1(2) of the RHC which in fact gives the plaintiff the proverbial second bite at the cherry. He is given an opportunity by sub-r (2) to explain that the omission to state the address in the writ was done innocently and without an intention to deceive. Overlooking this provision and giving no explanation therefore must necessarily mean that the said omission was deliberate. On these grounds alone, namely, the omission to state the local address or the absence of the explanation that the omission was innocent, I find that the defendant has made out a case for requiring security for costs.

Plaintiff's assets

The defendant has averred in his affidavit that the only known assets of the plaintiff is his 15% stake in the equity of Channel and he also alleged that Channel has practically ceased to operate. The plaintiff responded by stating that his shareholding in Channel amounted to 7,163 shares valued at RM1 each. He claimed to be entitled to 70% of the equity but this was disputed by the defendant in his affidavit in response. However, one pertinent fact I have to consider is the omission by the plaintiff to challenge the allegation that Channel has in fact practically ceased to operate. Following the decision of the Court of Appeal in *Ng Hee Toong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, I must hold that the failure of the plaintiff to contradict a positive assertion upon a material issue must be treated by this court as an admission by the plaintiff of the fact asserted. In the circumstances, it is open to this court to hold that there now is no evidence that the plaintiff's shareholding is even worth its par value, let alone any value.

The plaintiff also averred in his affidavit that he is the managing director and the majority shareholder of Merpati Nusantara Sdn Bhd, a company incorporated in Malaysia. The defendant responded by exhibiting to his affidavit a letter from the Registrar of Companies which showed that the plaintiff is not even registered with the Registrar of Companies as a shareholder and that the issued and paid-up capital of the said company is only RM2. In his reply, the plaintiff attempts to explain that he had made all advances and initial payments as he had founded the company. However, no documentary statements were annexed to show any expenditure incurred by him, let alone whether any expenditure was in fact incurred. I am constrained to hold that even on this issue of his assets in Malaysia, the plaintiff was far from candid.

I do not intend to consider the other issues raised by the defendant. I am fully satisfied that this is a proper case for me to exercise my discretion in favour of the defendant and to order security for costs, notwithstanding the fact that the defendant himself is a foreigner and on the basis that he has a local residence.

In my judgment, a sum of RM30,000 is sufficient security for costs. This sum is to be deposited as security for costs with the court within 30 days from date hereof. The defendant is to have the costs of this application.

Application allowed.

Reported by Mohd Rizal Abidin